IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 3.12.2008
CORAM

THE HONOURABLE MR.JUSTICE S.RAJESWARAN

C.R.P.PD.No.223 and 224 of 2006 and C.M.P.No.3398, 3399, 3400 & 3401 of 2007

1. K.Subramani
2. S.Lalitha
3. S.Kalpana ... Petitioners in both C.R.Ps.

Vs
1. P.Rajesh Khanna
2. P.Sasi Kumar ... Respondents in both C.R.Ps.

Both the Civil Revision Petitions are filed under Article 227 of Constitution of India, against the Orders dated 29.04.2005 passed in I.A.Nos.19 of 2005 and I.A.No.45 of 2005 in O.S.No.12 of 2004 on the file of the District Munsif cum Judicial Magistrate, Arcot.

For Petitioners in : Mr.A.Babu
both C.R.Ps.

For Respondents in : Mr.K.V.Anantha Krishnan
both C.R.Ps.

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COMMON ORDER

The above Civil Revision Petitions are filed against the Orders dated 29.04.2005 passed in I.A.Nos.19 of 2005 and I.A.No.45 of 2005 in O.S.No.12 of 2004 on the file of the District Munsif cum Judicial Magistrate, Arcot.

2. As the parties and the issues involved are one and the same, a common order is being passed to dispose of the Civil Revision petitions.

3. The defendants in O.S.No.12 of 2004 are the revision petitioners before this Court. O.S.No.12 of 2004 was filed by the respondents/plaintiffs for a permanent injunction restraining the defendants in the suit from creating any alienation or any encumbrance over the suit schedule property till their lifetime.

4. The case of the plaintiffs in O.S.No.12 of 2004 is that the suit schedule property originally belonged to their late grandfather P.C.Krishnasamy Chettiar. During his life time their grandfather executed a registered Will dt.30.11.1992 bequeathing the schedule mentioned properties and other

properties in favour of his two sons namely the first defendant/first revision petitioner herein and the father of the respondents/plaintiffs. As per the Will dt.30.11.1992, the Testator bequeathed the schedule mentioned properties to the defendants 1 & 2/revision petitioners 1 & 2 to be enjoyed till their lifetime without creating any encumbrance and after their lifetime, the properties should go to the legal heirs of the plaintiff's father. But the plaintiffs/respondents herein came to know that the first defendant/first revision petitioner executed a settlement deed on 26.4.2004 in favour of his daughter, third defendant/third revision petitioners settling the suit schedule properties in her favour. Hence, the respondents/plaintiffs filed O.S.No.12 of 2004 for the aforesaid relief.

5. The revision petitioners/defendants filed written statement and the suit is being contested. During trial, the revision petitioner herein filed I.A.No.19 of 2005 to reject the document marked as Exh.R1 and I.A.No.45 of 2005 to reject the plaint under Order 7 Rule 11 C.P.C. The trial court by separate orders dt.29.4.2005 dismissed both the applications and aggrieved by the same, the defendants in the suit filed the above two revision petitions under Article 227 of the Constitution of India.

6. Heard the learned counsel appearing for the revision petitioners and the learned counsel appearing for the respondents. I have also gone through the documents and judgments filed in support of their submissions.

7. The learned counsel for the revision petitioners submits that Exh.A1 is a certified copy of a Will and the same could not be admitted as a secondary evidence in the absence of the procedure contemplated under Sec.63 and 65 of the Indian Evidence Act. He further contends that the entire suit is based on the alleged Will, which is not yet probated in the manner known to law as per Sec.213 of the Indian Succession Act and in such circumstances, the respondents/plaintiffs could not convert the Civil Court into probate Court. According to the learned counsel, the trial court has failed to consider the relevant Acts and its provisions and committed an illegality in dismissing the applications. In support of his submissions, the learned counsel for the petitioners relied on the following judgments.
1. A.I.R. 1962(3) SCR (Supp) 294 (Mrs.Hem NoliniJudah (since deceased) and after her legal representative Mr.Marlean Wilkinson)

2. A.I.R. 1992 M.P. 224 (Ram Shankar Vs Balakoas)

3. 1996(4) SCC 457 (T.Venkata Narayana and others)
4. 2007 (3) C.T.C. 781 (J.Yashoda Vs K.Shobha Rani)

5. 1996(1) M.L.J. 328 (Perianayagam Vs Maria Arokiam)

6. 2000(1) L.W.476 (Balamani Vs Kailasam Konar)

8. Per Contra, the learned counsel for the respondents submits that no ground has been made out by the revision petitioners to reject the plaint under Order 7 Rule 11 C.P.C. He further contended that a Will executed by a Hindu in relation to a property situated outside Madras need not be probated at all. He further adds that a probate court cannot decide the title of the property and therefore, the respondents/plaintiffs could very well agitate the matter before the trial court. The learned counsel further urged that when relevant issues are framed including the issue with regard to the Will and when the mater is in the stage of cross examination of P.W.1, it is better to conduct a full trial to decide the issues rather than rejecting the plaint abruptly at this stage. In support of his submissions, the learned counsel for the respondents placed reliance on the following decisions.
1. A.I.R. 1930 MS 956 (Namberumal Chetti Vs Veeraperumal Pillai and others)

2. A.I.R. 2001 SC 1151 (Clarence Pais and others Vs Union of India)

3. 1951 (2) M.L.J. 523 (V.Ramaswami Aiyangar and another Vs Mr.S.M.S.Sundaresan Chettiar and others)
4. 2008(1) C.T.C. 80 (Kanwarjit Singh Dhillon Vs Hardyal Singh Dhillon and others)

5. 1983(2) M.L.J. 159 (Srinivasa Pill (died) and others Vs K.Ragunathan)

6. 2001(3) SCC 1 (Bipin Shantilal Panchal Vs State of Gujaraj and another)

7. 2005(7) SCC 510 (Popat and Kotecha Property Vs State Bank of India Staff Association)

9. I have considered the rival submissions carefully with regard to facts and citations.

10. Considering the fact that a number of decisions have been relied upon by both the learned counsel, I may consider them first to cull out the legal principles settled thereon.

(1) In A.I.R. 1962 (3) S.C.R. (Supp) 294 (cited supra), the Hon'ble Supreme Court held that Sec.213(1) of the Indian Succession Act creates a bar to the establishment of any right under a Will by an executor or a legatee unless the probate or letter of Administration of a Will have been obtained.

(2) In 1992 M.P. 224 (cited supra), the M.P. High Court held that in a Civil Court in a suit instituted by any party claiming right, title and interest in any property on the basis of a Will, no issue can be struck to decide if that Will was the last Will. The jurisdiction of Civil Court as per Sec.9 C.P.C. is impliedly barred not only to decide such an issue but to take cognisance of such a suit in which the plaintiff himself raises such an issue. The Madhya Pradesh High Court after directing the trial court in that case to return the plaint to the plaintiffs and gave one months time to approach the probate court, if so deserved.

(3) In 1996(4) SCC 457 (cited supra), the Hon'ble Supreme Court held as under:
"4. The only question is: whether the respondent is entitled to adduce secondary evidence to prove the alleged Will said to have been executed by Venkata Subbamma in her favour? The admitted position is that in the partition suit, after the Succession Act came into force, namely, 28-8-1969 Venkata Subbamma had compromised with her son and obtained a decree with covenants contained therein. What is the effect of that decree is the subject-matter in the pending suit. Whatever rights that were available to her thereunder would be available to the respondent who has come on record as legal representative. The mere suit for injunction cannot be converted into a suit for probation of a Will whereat the Will is to be proved. If the Will is to be proved according to law, it has to be by way of a probate in the court having competency and jurisdiction according to the procedure provided under the Indian Succession Act, 1925. That procedure cannot be converted in a suit for mere injunction as a probate suit and direct the parties to adduce evidence, be it primary or secondary evidence as the circumstances may warrant. The High Court has committed error of law and jurisdiction in directing adduction of secondary evidence in the suit for injunction to prove the Will alleged to have been executed by Venkata Subbamma."

(4) In 2007(3) C.T.C. 781 (cited supra), the Hon'ble Supreme Court held that secondary evidence as a general rule is admissible only and in the absence of primary evidence and if the original itself is inadmissible, party to the suit is not entitled to produce the secondary evidence. Only condition prescribed under Sec.65 of Indian Evidence Act, documents can be admitted as secondary evidence.

(5) In 1996(1) M.L.J. 328 (cited supra), this court held that a right claimed under a Will executed by a Indian Christian cannot be recognised by any court of law unless probate or Letter of Administration is obtained from a competent court. The relevant portion reads as under:
"10. Even in the plaint, it is said that the parties are Indian Christians and the plaintiff has filed the suit only on the basis of a Will alleged to have been executed by his father. A right is claimed under a Will executed by an Indian Christian cannot be recognised in any Court of Law unless probate or Letters of Administration is obtained from the competent court. Admittedly, the plaintiff has not obtained any probate or Letters Administration.

11. Sec.213(1) of the Indian Succession Act reads thus:
"No right as executor or legatee can be established in any court of justice, unless a court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will nor with a copy of an authenticated copy of the Will annexed."

It is a total prohibition on the part of the legatee to establish his right as such unless a probate or Letters of Administration is obtained.

13. In this case, admittedly, the plaintiff has not obtained any probate or Letters of Administration. The suit is based only on a Will. If the Will cannot be put forward as a basis for claiming a share, the suit can only be dismissed."

(6) In 2000(1) L.W. 476 (cited supra), this court recognised the power of court to reconsider the admissibility of a document though it is admitted by inadvertance, or mistake or without considering its admissibility. The relevant portion reads as under:
"9. In view of the said decision, the contention of the learned counsel is rejected. The Court has power to consider the admissibility of a document though it is admitted by inadvertence or mistake of without considering its admissibility. There is no question of principle of estoppel or waiver for application in such cases. If a law prohibits the admission of a document in evidence, court cannot admit the same merely because it was not objected or by the defendant merely because the objection was taken belatedly. If a document is found to be inadmissible in evidence and it is brought to the notice of Court, the Court is bound to rectify the mistake."

(7) In A.I.R. 1930 MS 956 (cited supra), a Division Bench of this court held that Sec.57 of the Indian Succession Act shows that in the case of Wills executed outside Madras, probate must be taken of then only in so far as they relate to immovable property situated within Madras. The Wills are classified into (1) Wills and Codicils made by any Hindu on or after 1.9.1870 within the local limits of the High Court's ordinary original Civil jurisdiction and (2) all such Will and codicils made outside those limits.

(8) In A.I.R. 2001 SC 1151 (cited supra), the Hon'ble Supreme Court held that a probate will not required to be obtained by a Hindu in respect of a Will made outside those territories or regarding the immovable properties situated outside those territories. The relevant portion reads as under:
"6. The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a will without production of a probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the

right is only for its establishment in a court of justice and not its being referred to in other proceedings before administrative or other tribunals. The section is a bar to everyone claiming under a will, whether as a plaintiff or defendant, if no probate or letters of administration are granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub-section (1) for the purpose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. Section 57(c) of the Act applies to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of wills by Muhammadans. Now by the Indian Succession (Amendment) Act, 1962, the section has been made applicable to wills made by Parsis dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Sections 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct."

(9) In 1951(1) M.L.J. 523 (cited supra), A Division Bench of this court held that when once it is conceded that with respect to Wills executed by Hindus outside the city of Madras, it is unnecessary to take out a probate in order that the device under the Will should be effective, the question will arise as to whether any order by a Court directing the issue of a probate will necessarily involve the compulsory deposit of stamps necessary for the issue of the probate.

(10) In 2008(1) C.T.C. 80 (cites supra), the Hon'ble Supreme Court held that probate court was not competent to determine whether the Testator had or had not the authority to dispose of the properties he purported to have bequeathed by his Will and the probate court is also not competent to determine the question of title to the suit properties.

(11) In 1983(2) M.L.J.159 (cited supra), this court held that nobody can dispute the general principle that a person in peaceful possession is entitled to be maintained in possession against all but the true owner and the suit by such a person for an injunction against any other person threatening to dispossess him is maintainable.

(12) In 2001(3) SCC (1) (cited supra), the Hon'ble Supreme Court depricated the practice that during the evidence collecting stage, whenever any objection is raised, regarding admissibility of any material in evidence, the court does not proceed further without passing orders on such objection. Such practices when realised through the course of long period to be hindrances which impede study and swift progress of trial proceedings. Instead of the archaic practice being prevalent now, the Hon'ble Supreme Court substituting a new practice, according to which whenever an objection is raised during evidence taking stage regarding the admissibility of any material, the trial court can make not of such objection and mark the objected document tentatively as an exhibit subject to such objection to be decided at the last stage in the final judgment. However, the Hon'ble Supreme Court made it clear that if the objection relates to deficiency of stamp duty of a document, the court has to decide the objection before proceeding further.

(13) In 2005(7) SCC 510 (cited supra), the Hon'ble Supreme Court held that Order 7 Rule 11(d)

C.P.C. applies only where the statement as made in the plaint without any doubt or dispute shows that the suit is barred by any law in force and it does not apply in case of any disputed question.
11. In the light of the above judgments, now I may consider the facts of the present case to find out whether the plaint in O.S.No.12 of 2004 is to be rejected and the document marked as Exh.A1, which is the certified copy of the Will is to be rejected.

12. The plaint averments if read as a whole, Will show that according to the respondents/plaintiffs, the suit schedule property could never be alienated by the revision petitioners 1 & 2 and defendants 1 & 2 during their lifetime and hence they sought for the relief of permanent injunction. The entire claim of respondents/ plaintiffs is based on a Will dt.30.11.1992 said to have been executed by their grand father. The case of the revision petitioners/defendants is that the first defendant is the absolute owner of the property and the first defendant's father (grandfather of the respondents/plaintiffs) during his lifetime made an oral family arrangement in the year 1990 allotting the suit property to him and therefore, the first defendant became the absolute owner of the properties allotted to him. In such circumstances, the trial court has framed necessary issues including the execution of the Will and the ownership of the first revision petitioner. It is not in dispute that the trial has already commenced and during the chief examination of P.W.1, a certified copy of the Will dt.30.11.1992 was marked as Exh.A1 and when the suit was posted for cross examination of P.W.1, the revision petitioners filed I.A.No.19 of 2005 and I.A.No.45 of 2005 for the aforesaid reliefs.

13. From the judgments, relied on by the learned counsel, one thing is very clear with respect to Wills executed by Hindus outside the City of Madras, it is unnecessary to take out a probate. It is true that Madhya Pradesh High Court in A.I.R. 1992 M.P. 224 (cited supra) rejected the plaint on the ground that the Will was not probated. But, the Judgment of the Hon'ble Supreme Court reported in 1962 (3) SCR. (Supp) 294 (cited supra), was delivered in the context of a Will executed by a Christian and not by a Hindu. Therefore, I am of the considered view that plaint in O.S.No.12 of 2004 could not be rejected on the ground that the Will dated 30.11.1992 was not at all probated.

14. That apart considering the fact that issues have been framed, trial has commenced, P.W.1 was examined in chief and documents were marked through him, it is better in the interest of justice to complete the trial and decide all the issues on merits.

15. Further, Exh.A1 is a certified copy of the Will and merely marking the same, it cannot be stated that it has been proved by the respondents/plaintiffs. Necessary issues have been framed in this regard and the same could be gone into all the time of deciding the issues. Further, the Hon'ble Supreme Court in 2001(3) SCC 1 (cited supra) proposed a new practice substituting the archaic practice according to which the objection raised regarding the admissibility of any material could be noted and the objected document could be marked tentatively as an Exhibit. This practice could be adopted for all objections excepting to the objection relating to the deficiency of stamp duty of a document which is to be decided before proceeding further.

16. In the light of the above Hon'ble Supreme Court judgment, I am of the considered view that Exh.A1 could not be rejected as contended by the revision petitioners.

17. In the result, I do not find any merit in the above two Civil Revision petitions and the same are dismissed. No costs. Connected Civil miscellaneous petitions are also dismissed.

18. However, I make it very clear that all issues are left open to be decided by the trial court at the time of disposing of the suit and the trial court should decide all the issues on merits and in accordance with law independently without getting influenced by the observations made in this

order.

3.12.2008

Index: Yes/No
Internet:Yes/No
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To
The District Munsif cum Judicial Magistrate, Arcot.

S.RAJESWARAN,J
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Pre-Delivery Common Order in
C.R.P.PD.No.223 and 224 of 2006 and
C.M.P.No.3398, 3399, 3400 & 3401 of 2007

03.12.2008